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CASE NO.

IN THE

SUPREME COURT OF THE UNITED STATES

October, 1981

WILLIAM LANAY HARVARD,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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TABLE OF CITATIONS

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida filed on April 15, 1982, rehearing denied June 22, 1982.

CITATION TO OPINIONS BELOW

The opinion of the Supreme Court of Florida, Case No. 47,052, is reported as Harvard v. State, 414 So.2d 1032 (Fla. 1982) and is set out at pages 5a-10a in the Appendix hereto. Petitioner's conviction had previously been affirmed and the sentence vacated in a decision reported as Harvard v. State, 375 So.2d 833 (Fla. 1978) which is set out at pages 1a-4a of the Appendix hereto. Petitioner sought certiorari in this Court regarding the judgment upholding the conviction only and this Court denied certiorari in Harvard v. Florida, 441 U.S. 956 (1979).

JURISDICTION

The judgment of the Supreme Court of Florida was filed on April 15, 1982, and petitioner's timely motion for rehearing was denied by order dated June 22, 1982. (The order denying rehearing is set out at page 11a of the Appendix). On August 10, 1982 Justice Powell signed an order extending the time for filing the petition for writ of certiorari to and including September 21, 1982. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257 (3), petitioner having asserted below and asserting herein deprivation of rights secured by the

Constitution of the United States.

QUESTIONS PRESENTED FOR REVIEW

1. What is the proper disposition where there has been a direct violation of Gardner v. Florida, 430 U.S. 349 (1977) by the consideration of secret information in imposing the death sentence; is the procedure applied in the present case involving a post-sentence, post-appeal proceeding where the scope of evidence petitioner was allowed to present was strictly limited and where the prior Gardner-violative death sentence was presumed correct with the burden on petitioner to prove harmful error, consistent with the decision in Gardner and with the Eighth and Fourteenth Amendments?

2. Whether by affirming the application of the aggravating factor of "heinous, atrocious or cruel" solely on the basis of the undefined terms of "stalking" and "harassment", the Florida Supreme Court has placed such a broad and vague construction on the §921.141 (5)(h) aggravating factor so as to violate the Eighth and Fourteenth Amendments and whether the intervening decision in Godfrey v. Georgia, 446 U.S. 420 (1980) must be given retroactive effect in such circumstances and where the jury was provided with no definition of the §(5)(h) aggravating factor?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This cause also involves Section 921.141, Florida Statutes (1973) entitled: "Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence." Because of its length the statute is set out in its entirety at pages 12a-13a of the Appendix hereto.

STATEMENT OF THE CASE

Petitioner was indicted in 1974 for first degree murder of his ex-wife, Ann Bovard. He was convicted as charged after trial by jury and in the separate sentencing trial the jury returned, by an 8 to 4 vote, a recommendation of the imposition

of the death sentence. The judge sentenced petitioner to death and petitioner appealed to the Supreme Court of Florida. The Supreme Court of Florida affirmed petitioner's conviction and death sentence (1a-3a); Harvard v. State, 375 So.2d 833 (Fla. 1978). While the case was pending on rehearing, the Florida Supreme Court issued an order pursuant to Gardner v. Florida, 430 U.S. 349 (1977), requiring the trial judge to state whether he had considered any information not disclosed to petitioner in imposing the death sentence. The trial judge responded that he had considered certain confidential information in the sentencing. Petitioner then filed, in the Florida Supreme Court, an application for relief pursuant to Gardner. The Supreme Court of Florida issued an order denying rehearing and vacating and remanding the death sentence for the violation of Gardner (3a); 375 So.2d at 835.

Thereupon, further proceedings were conducted in the sentencing court. Petitioner filed a motion for substitution of judge, a motion for convening of an advisory jury, and a motion for statement of aggravating circumstances which were each denied. A hearing was then held in the sentencing court on February 9, 1979. The state presented no testimony or evidence. Petitioner presented the testimony of Charles Hess, petitioner's attorney for a prior 1969 Jacksonville offense, and petitioner testified. Petitioner also introduced into evidence a prior psychiatric report and proffered the preliminary hearing transcript from the prior Jacksonville offense. Petitioner proffered the testimony of Mr. Hess regarding the factors the Jacksonville judge had before him in sentencing petitioner on that prior offense, regarding the psychiatric report done in Jacksonville relative to the prior offense, and regarding inconsistences in the facts relating to that prior offense. Petitioner also testified regarding that prior offense and regarding the present offense.

The sentencing judge ruled that most of the evidence regarding the prior Jacksonville offense that petitioner had proffered was beyond the scope of the remand by the Florida Supreme Court and thus refused to consider it. Finding that

the previous death sentence was appropriate, the judge reimposed the death penalty on August 22, 1979, without issuing findings of fact in support of that sentence. In March, 1980 the trial judge issued "proposed" findings of fact, requesting that the prosecutor comment as to whether the aggravating and mitigating circumstances contained in that proposed order would "pass appellate review." The prosecutor responded concerning three of the four aggravating factors found in the order. The judge adopted the suggested changes and this time finding two aggravating factors, filed his final judgment on resentencing in May, 1980.

An appeal was taken by petitioner to the Supreme Court of Florida which affirmed the proceedings conducted in the trial court and the reimposition of the death sentence.

REASONS FOR GRANTING THE WRIT

1. The inadequacy of the Florida procedure to remedy a violation of Gardner v. Florida, 430 U.S. 349 (1977). This case presents the question of the constitutional adequacy of the procedure employed by the Florida courts where there has occurred a direct violation of Gardner v. Florida, 430 U.S. 349 (1977). It is a question that was not specifically resolved by this Court in Gardner but one which is of significant importance and in need of resolution.

This case presents the proper case for resolution of the question. The record in the instant case pellucidly highlights the defects in the Florida Gardner procedure and the issue was fully preserved, developed, and addressed in the lower courts. The case-at-bar gives the lie to the constitutional sufficiency of the corrective procedure employed by the Supreme Court of Florida.

The constitutional question is important and in need of resolution because it was left open by this Court and because the procedure adopted by the Florida courts is inconsistent with the opinion in Gardner. And, although not controlling on the question, it is not of minor significance in evaluating the Florida Gardner procedure, to note that under that procedure, only Mr. Gardner's sentence was changed while all other Gardner-violative death sentences have been reaffirmed.

In Gardner v. Florida, supra, the precise relief to be granted was left open by this Court, except that the death sentence had to be vacated and that any further proceedings would have to take place at the trial level. 430 U.S. at 362. It was ordered that there be "further proceedings at the trial court level not inconsistent with this opinion." Id. The issue here is whether the Supreme Court of Florida complied with the mandate of this Court.

There are two major constitutional defects in the Gardner procedure employed in the case-at-bar. First, the original, Gardner-violative, death sentence is presumed to be

correct in the resentencing proceedings, with the result that the burden is placed upon the capital defendant to prove the prior sentence was wrong and should be changed. Second, the scope of allowable information that may be presented at the further proceedings is exceedingly narrow, with the result that the Eighth and Fourteenth Amendments mandate of individualized sentencing and reliability in capital sentencing was thwarted.

In the direct appeal of this cause, the Supreme Court of Florida, with two justices dissenting, affirmed petitioner's death sentence (1a-3a). Then, while the case was pending on rehearing,[1/] it was discovered that the sentencing judge had relied upon a confidential presentence investigation report not disclosed to counsel or petitioner, in direct violation of Gardner v. Florida, supra. (3a).[2/] Petitioner then filed for relief pursuant to Gardner, requesting that the Supreme Court of Florida "vacate the sentence, and remand this cause for a new sentencing trial." In response the Supreme Court of Florida issued its order, denying rehearing, but vacating the sentence of death for the Gardner violation (3a). The court sent the cause back to the sentencing judge for what on its face appeared to be broad relief, but which in application turned out to be severly restricted, as follows:

> The case is remanded to the trial court for resentencing without the necessity of convening an advisory jury, but with directions to provide counsel for the state and the defendant an opportunity to explain, contradict, and argue regarding the relevance, materiality, and import of the confidential information and military

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[1/] In his rehearing petition in the Supreme Court of Florida, petitioner had pointed out the possibility of a violation of Gardner: "There is some indication in the record that the judge considered matters not provided to the jury or defense counsel.... Therefore this Court should order a new sentencing hearing at which the jury may view all relevant factors."

[2/] The secret consideration was disclosed as a result of the procedure adopted by the Florida Supreme Court after Gardner, to identify Gardner violations. After Gardner, the Court issued orders to trial courts in all pending capital appeals to disclose whether they had considered confidential information in sentencing. The trial judge in the present case disclosed that he had considered secret information in sentencing petitioner. The procedure adopted by the Florida Supreme Court for identifying Gardner violations is not in question in this case, rather the question involves the procedure after the violation has been identified.

> history, as well as other matters properly considered by the trial court concerning appellant's sentence under Section 921.141, Florida Statutes (1977).

(3a).

Although the court said that it was remanding for "resentencing", in actuality the cause was remanded with the prior Gardner-violative sentence presumed to be correct and with the scope of information that petitioner could present being severely limited.

a. Restricted scope

After the remand by the Supreme Court a hearing was conducted in the sentencing court. Petitioner had previously filed and had denied several motions relating to the adequacy of the Gardner relief--motions for a different sentencing judge[3/] and for a sentencing jury.[4/] Petitioner's primary concern at the hearing was to present mitigating or ameliorative evidence relating to a prior Jacksonville offense, and hence responding to the characterizations and opinions regarding that offense contained in the undisclosed secret presentence investigation report (PSI). This prior Jacksonville offense, involing an assault on petitioner's first wife and her sister, was critically important as it is the primary reason that the death sentence was imposed and upheld in the present case. That this prior offense was the single most dominant factor leading to the death sentence in this case is shown by the fact that petitioner's death sentence is the only case where a death sentence has been upheld in Florida in a "domestic" situation.[5/] It also was the dominant theme of the Florida

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[3/] The request for a different sentencing judge was based upon the ground that the judge had already considered and relied upon the offending secret information and thus could not fairly reevaluate the evidence in resentencing, relying in part upon Santobello v. New York, 404 U.S. 257 (1971) and like cases.

[4/] The jury was requested on the grounds that serious and fundamenta error had been committed in the consideration of evidence presented in the prior sentencing trial and thus the jury's verdict, necessary for a death sentence under Florida law, could not be relied upon in the new sentencing proceeding. Thus, a full presentation of evidence was required.

[5/] The only three cases where the Florida Supreme Court has remanded for entry of life sentences, overruling both judge and jury, have involved killings resulting from emotional

Supreme Court's original opinion affirming the death sentence (2a-3a) and of the evidence presented by the prosecution and of the trial court's sentencing orders.

Not coincidentally was the prior Jacksonville offense the dominant theme, and the subject of much innuendo and characterization, in the secret PSI. At the hearing, petitioner sought to present evidence to more fully explain, to mitigate and ameli rate, the circumstances of the offense. Petitioner was, however, thwarted from doing so by the sentencing judge's ruling that such evidence was beyond the scope of the Gardner proceedings, reasoning that since testimony regarding the Jacksonville offense had been presented in the original sentencing trial, such testimony at the Gardner proceeding was irrelevant. The judge strictly limited the scope of the hearing, ruling that the Gardner remand was only for the purpose of rebutting information in the secret PSI and since evidence was presented on the Jacksonville offense in the prior sentencing, information regarding that offense would not be in rebuttal of the PSI but rather would be an attempt, in essence, to reopen the prior sentencing trial.

Petitioner was allowed, however, to proffer evidence and he did so.[6/] The poison in the secret PSI involved much more than had been presented in the prior sentencing trial. The poison

Footnote 5 continued:

domestic situations. Blair v. State, 406 So.2d 1103 (Fla. 1981); Kampff v. State, 371 So.2d 1007 (Fla. 1979); Halliwell v. State, 323 So.2d 557 (Fla. 1975). In no such similar "domestic" case has the death penalty been upheld. See also Phippen v. State, 389 So.2d 991 (Fla. 1980); Chambers v. State, 339 So.2d 204 (Fla. 1976); Tedder v. State, 322 So.2d 908 (Fla. 1975). Cf. Spinkellink v. Wainwright, 578 F.2d 582, 612 n. 37 (5th Cir. 1978) (where the State of Florida argued that domestic cases were not "appropriate for imposition of the death penalty.").

6/ In brief summary, petitioner sought to show that the Jacksonville offense was not deliberate nor planned, that it had begun over a reasonable and sincere concern for the welfare of his children, that it was highly emotional situation and that he was unarmed. Petitioner also sought to show through the proffered testimony of his attorney in that charge, all of the factors before the sentencing judge in that Jacksonville offense; for example: "Mr. Harvard had been in three courts in one morning [on the day of the offense]"; "He had been harrassed by his wife... she was vicious at that time"; "the Court knew of the circumstances of her running around on Mr. Harvard [and that] she was entertaining a man in her trailer"; and that "the cap of it was the eight-year-old child asked her father [petitioner]...what her mother was doing in bed wrestling with another man."

in the secret PSI was its characterizations, innuendo, unsupported facts,insinuations,and its use of that prior offense to form opinions and recommendations regarding petitioner.[7] The judge had relied on that secret PSI in first imposing the death sentence. Petitioner sought to respond to show all of the factors surrounding that prior offense in order to ameliorate the false characterizations and the overemphasis that had been placed upon it. For example, on that prior Jacksonville offense, petitioner had been sentenced to one year probation, with three months in the county jail and such sentence was not based upon a plea bargain. Such sentence contraindicates that the offense was asdeliberate and serious to warrant the extreme, dominant weight it was given in sentencing petitioner to death. The secret PSI criticized that sentence as being "leninent" and also said that it was based on a plea bargain. As evidence at the Gardner hearing, petitioner sought to have his attorney in that prior offense testify in order to showall of the factors that the Jacksonville judge had before him in imposing that sentence. In essence petitioner sought to show that the Jacksonville offense was not as severe as it had been characterized and thus not deserving of the overwhelming emphasis that had been placed upon it.[8] Petitioner thus sought to present mitigating evidence.

The judge however, ruled the evidence to be improper.

Footnote 6 continued:

Petitioner also sought to contradict some of the testimony of the ex-wife as given in the prior sentencing trial and as relied upon and reported in the secret PSI--- such as that he had not intentionally shot his wife and thrown her to the ground and put his foot in her back and took aim. In essence, petitioner sought to show the full circumstances to ameliorate the emphasis placed on the prior offense.

[7] For example, the secret report is filled with insinuations and characterizations that are false, such as that petitioner "fully intended to kill them" in that Jacksonville incident. It further speculated that petitioner "will go to any lengths.... in order to retaliate...." The report also claims that petitioner "placed a pistol against the head of these two women and pulled the trigger." It also said that the Jacksonville judge had been "extremely lenient" and that petitioner had entered into a plea bargain for a reduced sentencing. The secret PSI not only contained this false innuendo and "facts" but thus used it to form opinions and recommendations regarding petitioner.

[8] The Florida Supreme Court recognizes a difference in the "qualit of aggravating circumstances. See Demps v. State, 395 So.2d 501, 506 (Fla. 1981).

He recognized only a very narrow scope of the proceedings under the Florida Supreme Court's Gardner remand and ruled that only such evidence as went only to rebut specific facts in the secret PSI, not previously the subject of the prior sentencing hearing, could be presented.

The judge resentenced petitioner to death after the Gardner hearing, stating that the prior sentence was still proper. Then, nine months later, he filed findings of fact in support of the death sentence in which he expressly stated that he refused, as a matter of law to consider the evidence offered by petitioner.[9/] Petitioner challenged the narrow scope of the Gardner proceedings on appeal to the Supreme Court of Florida.[10/] The Supreme Court of Florida ruled directly upon the federal question and reaffirmed the extremely narrow scope it allows in proceedings conducted after a Gardner violation. It summarized its holding as follows:

> This Court's remand for resentencing was for the purpose of redressing a Gardner violation. Under our order, the trial judge was obligated to consider the evidence offered by appellant to explain contradict, or rebut information which had been previously undisclosed to appellant or his counsel. We conclude that the trial judge went beyond what was necessary in allowing appellant a full opportunity to present evidence at the resentencing hearing in rebuttal of the confidential information previously considered; we find no error.

(emphasis supplied) (9a). The Supreme Court of Florida thus clearly iterated the limited scope it would allow in Gardner proceedings and applied that narrow limitation strictly in

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9/ In his order the judge stated:

> "[I]t appears to this Court that, while there was a summary of the 1969 shootings of a former wife and a former sister-in-law contained in the confidential portion of the presentence investigation, the Defendant's main thrust was to impeach the testimony of the former wife and former sister-in-law as given in the bifurcated sentencing phase of his trial and not the summarized information as set out in the presentence investigation. Such impeachment should have been done at the time of trial and it therefore appears that this was wrongful attempt to belatedly impeach evidence presented by the State to the advisory jury. The Supreme Court's Remand was not for this purpose."

10/ The point on appeal presented to the Florida Supreme Court by petitioner was that: "The procedure employed in resentencing appellant to death denied appellant due process of law and constituted cruel and unusual punishment.... B. The lower court improperly limited the scope of resentencing proceedings."

the present case. The Court reasoned that since the evidence petitioner sought to present to mitigate the material in the secret PSI had been the subject of evidence also at the prior sentencing trial, it could not be considered because it was not "information... previously undisclosed." The result was that petitioner was precluded from presenting and the Florida courts refused to consider, as a matter of law, the ameliorative, mitigating and explanatory evidence and arguement offered by petitioner. The Court has given no reason for its holding that Gardner proceedings are so limited in scope. Nevertheless such a limitation violates both the spirit and the letter of the Gardner holding. In Gardner it was held that a death sentence imposed in part upon secret information denied due process of law. 430 U.S. at 362. A post-sentence, post-appeal proceeding where the evidence petitioner is allowed to present is so narrowly restricted so as to preclude the type of ameliorative evidence as sought to be presented here, cannot cure the due process violation. Such a procedure clashes with the unique need for reliability required for capital sentencing and belies the requirement of an individualized sentencing determination. The evidence petitioner sought to present certainly related to the "defendant's character or record and any of the circumstances of the offense...." required by the Eighth Amendment to be considered. Lockett v. Ohio, 438 U.S. 586, 604 (1978). That this Court expected a broader scope of proceedings is shown by the refusal in Gardner to allow as relief that the Supreme Court of Florida review the secret PSI. 430 U.S. at 320. By rejecting such a review as adequate to correct the due process violation, this Court held that a proceeding restricted to review of the secret PSI would be insufficient because it would not be a resentencing with a weighing and evaluation of aggravating and mitigating factors. See also Gardner v. Florida, supra, 430 U.S. at 370 n. (Marshall, J., dissenting).

b. Presumption of correctness

Moreover, in conjunction with this exceedingly sterile and narrow scope of proceedings, the Florida courts further limited the Gardner relief procedure by application of a presumption of

correctness of the prior Gardner-violative death sentence and by placing the burden on petitioner. The result is that the Florida courts have constructed a form of relief that is in effect identical to the form of relief expressly rejected by this Court in Gardner. In practice, this presumption required that petitioner prove prejudice from the Gardner violation. Implicit in this Court's rejection as relief that the Florida Supreme Court review the secret PSI, was the holding that an analysis of prejudice or harmless error would be inadequate to correct the due process violation.

That the presumption that the Gardner-violative sentence was correct was applied in the present case is expressly shown by the record. At the conclusion of the hearing in the sentencing court after the remand, the judge reimposed the death sentence, stating that petitioner had not shown anything in the hearing to change the prior sentence: "The Court is of the opinion that the sentence as earlier imposed is still an appropriate sentence." The sentencing court issued no findings of fact or weighing of aggravating and mitigating factors at the time that the sentence was imposed -- those findings were not made until nine months later.[11/] The use of the presumption of the correctness of the prior sentence is evident. The Supreme Court of Florida's opinion on direct appeal expressly

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11/ That the sentencing judge did not weigh aggravating and mitigating factors is shown by his sentencing procedure. He imposed the sentence, saying that the prior sentence was proper. He entered no findings of fact and no analysis of aggravating and mitigating factors at that time. Not until nine months later did the judge enter findings in support of the sentence, and then the record shows that he only entered the findings in order to retrojustify an already imposed sentence so that it would "pass appellate review." Prior to issuing his findings, the judge sent out proposed findings and asked the state to advise him whether they "will pass appellate review." The state responded with suggested changes and the judge adopted the changes, altering the aggravating factors that he had found in his proposed order. The judge thus did not use the aggravating and mitigating factors to determine the appropriate sentence but rather used them in order to allow his previously imposed death sentence to "pass appellate review." Such a procedure is neither reliable nor individualized and pellucidly demonstrates the presumption of correctness he placed on the prior sentence.

recognizes and upholds the presumption of correctness of the prior sentence that was applied in the Gardner proceedings:

> "[The sentencing judge's] conclusion that the death sentencing was again appropriate clearly indicates that his finding is based upon the failure of the defense to present sufficient evidence at resentencing to rebut the information contained in the confidential portion of the presentence investigation report or in the military records. The written order expressly states that the defendant had failed to show harm or errors in the confidential matters considered in the original sentencing procedure."

(emphasis supplied) (7a).[12/]

Thus, the procedure where there has been a direct Gardner violation as applied in this case, was highly restrictive in scope and legal effect. It placed the burden on petitioner to prove harm from the Gardner violation and allowed petitioner only an extremely narrow scope of evidence in which to do so. The relief fashioned by the Florida courts in this case was a post-sentence, post-appeal proceeding where he was strictly limited to presenting evidence that went only to information in the secret PSI and where the burden was placed upon him to show harmful error in the Gardner violation.

In Gardner, this Court remanded for "proceedings at the trial court level not inconsistent with this opinion." 430 U.S. at 362. The proceedings in the present case were inconsistent with the mandate of Gardner. The Gardner-relief procedure in Florida is a sham, a "resentencing" in words only.

This Court should accept jurisdiction in this case to review the constitutional question left open in Gardner.

12/ The Florida Supreme Court has in other cases applied the restrictive scope of Gardner remand proceedings -- not allowing challenges to aggravating factors nor presentation of mitigating circumstances -- and has applied the presumption that the prior Gardner-violative was correct -- thus placing the burden on the defendant and refusing to review the propriety of previously found aggravating factors. See, e.g., Dougan v. State, 398 So.2d 439 (Fla. 1981). In dissent in Dougan, two justices opined, contrary to the majority that: "The original sentence was vacated. If execution as ordered is to take place, then that execution must be predicated on the last-imposed sentence, which must be free from infirmities. Just because it is the same as a prior affirmed sentence does not necessarily make this one correct; it must pass constitutional muster on its own." (emphasis supplied) Id. at 44)

2. The vagueness and overbreadth of the aggravating circumstance of "especially heinous, atrocious or cruel" and the retroactivity of Godfrey v. Georgia, 446 U.S. 420 (1980). The application and affirmance of the aggravating circumstance of "especially heinous, atrocious or cruel" [Fla.Stat. §921.141 (5)(h)] by the Supreme Court of Florida in the present case is violative of the need to channel sentencing discretion by "clear and objective standards." Gregg v. Georgia, 428 U.S. 153, 198 (1976).

The case-at-bar is the proper case to review this important Eighth and Fourteenth Amendment question, not only because its facts are strikingly similar to those in Godfrey v. Georgia, supra, but also because the Florida Supreme Court upheld the application of the §(5)(h) aggravating circumstance on a narrow, but nonspecific ground, that pellucidly highlights the standardless application.

The situation in the present case arises out of a bitter and emotional divorce. There had been several confrontations between the two for several months. On the night of the offense, petitioner was going into work at his cabinet shop, but on the way into the shop he met a friend/employee who was depressed and wanted to talk. They bought some beer and went to the beach where they sat in petitioner's car, drank and talked for several hours. At a bar close by, petitioner's estranged wife's car was in the parking lot.[13/] As petitioner and his friend began to leave the beach, petitioner's wife was driving away from the bar and petitioner followed her down a main thoroughfare of the town. At one point she slowed and pulled to the shoulder of the road and petitioner pulled up beside her. A shotgun was pointed through the passenger side of petitioner's car and one shot was discharged.[14/] The deceased was killed instantaneously.

[13/] The bar was erroneously noted by the Supreme Court of Florida as being the wife's place of employment.

[14/] There is some question as to whether petitioner fired the shot or whether petitioner's friend pulled on the gun causing it to discharge. His friend testified that he had thought he caused the gun to fire but that the police had convinced him otherwise though he admitted pulling on the gun at the time it discharged. Nevertheless, the Florida courts found that petitioner had fired the shot.

Such circumstances under previous Florida precedent would not constitute "especially heinous, atrocious or cruel."[15] This face was implicitly recognized by the Florida Supreme Court when it upheld the §(5)(h) aggravating factor by finding so called "additional acts." The court said:

> "... appellant's lying in wait for and stalking of Ms. Bovard, compounded by appellant's previous harassment of her, constitute sufficient 'additional acts' to justify application of the heinous, atrocious, or cruel aggravating factor."

(9a).

The Florida Supreme Court has given no definition of "stalking" or "harassment" so as to justify a finding of the §(5)(h) aggravating factor.[16] In fact, in previous cases the court had rejected such a finding under similar circumstances. For example, in Kampff v. State, 371 So.2d 1007 (Fla. 1979) the court rejected heinous, atrocious or cruel as an aggravating circumstance where the defendant went to his wife's place of employment and fired at least five shots, killing his wife. Kampff had previously given his son "a .38 caliber bullet to give to his mother and told him to tell her to 'have fun'." Id. at 1009. The trial court had found that petitioner had been brooding over his divorce and planned the murder for three years. Kampff additionally had been "harassing" his former wife since their divorce and he had asked their daughter whether she would miss her mother "if anything happened to her." Id. In Blair v. State, 406 So.2d 1103 (Fla. 1981) the defendant made elaborate plans to kill his wife and on the day of the offense he arranged for everyone else to be out of the house where he shot and killed his wife. The Supreme Court of Florida rejected especially heinous, atrocious or cruel as an aggravating factor. The situation in Halliwell v. State, 323 So.2d 557 (Fla. 1975) arose from an emotional love triangle where the defendant killed his lover's husband by crushing his skull

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15/ See, e.g., Lewis v. State, 398 So.2d 432, 438 (Fla. 1981) ("... a murder by shooting ... is as a matter of law not heinous, atrocious or cruel."); Maggard v. State, 399 So.2d 973, 977 (Fla. 1981) (murder by a single shot gun blast is not heinous, atrocious, or cruel); Lewis v. State, 377 So.2d 640, 646 (Fla. 1980)

16/ The dictionary definitions do not aid in narrowing the meanings: "Harass" is "to annoy continually" with synomyms of "harry, plague,

with a 19-inch iron "breaker bar" and then dismembered the body. The Florida Supreme Court found "nothing more shocking in the actual killing than in the majority of murder cases reviewed by this Court." Id. at 561. Also, in Lewis v. State, 398 So.2d 432 (Fla. 1981) the court rejected the finding of 8(5)(h) where "[t]he trial court judge based his finding that the murder was heinous, atrocious, and cruel on the fact that the murder was premeditated, cold and calculated, and stealthily carried out." Id. at 438. See also Armstrong v. State, 399 So.2d 953 (Fla. 1981).[17/]

Accordingly, there is no specific and detailed guidance by the Florida Supreme Court as to "stalking" or "harassment" establishing heinous, atrocious or cruel. In the cases referred to in the above paragraph, as well as other, heinous, atrocious or cruel had been rejected under such circumstances. The result is the failure to "tailor and apply [Florida's capital sentencing] law in a manner that avoids the arbitrary and capricious infliction of the death penalty." Godfrey v. Georgia, supra, 446 U.S. at 428.

There is nothing in the words "stalking" and "lying in wait" that gives any guidance or implies any restraint on the capricious imposition of the death penalty. It is also important to note that those "findings" of "stalking" and "lying in wait" by the Florida Supreme Court were not findings by the sentencing judge in this sentencing. Rather those "findings" come directly from the Florida Supreme Court's prior oponion in this case (before the vacation of the sentence for a Gardner violation). On resentencing the sentencing judge had removed those findings, apparently because they were unsupported by the evidence, and thus the Florida Supreme Court's affirmance of the 8(5)(h) aggravating factor suffers

Footnote 16 continued:
pester, tease and tantalize"; and "stalk" is "to walk stiffly or haughtily" or "to approach stealthily." The Merriam-Webster Dictionary.

17/ The facts of the present case are also closely similar, although somewhat less agregious, to those faced by this Court in Godfrey v. Georgia, supra, where it was held that the "petitioner's crimes cannot be said to have reflected a consciousness materially more 'depraved' than that of any person guilty of murder."

from the additional defect of being based upon findings not made by the trial court. Cf. Presnell v. Georgia, 439 U.S. 14 (1978). The "stalking" and "lying in wait" findings are in fact unsupported by the record which shows that petitioner had not planned to go to the beach to drink that night but had planned to work until meeting his friend on the way. All the record shows is that petitioner left at the same time his ex-wife left the bar (at closing) and that he was behind her, following, as they drove down a main thoroughfare. There is nothing to show that petitioner planned to shoot his wife.[18/] As to the "harassment," it appeared to be at least somewhat mutual and not unlike usual bitter emotional divorces.[19/] It remains that there is nothing in the Florida Supreme Court's opinion to define, guide, restrict or control the application of the §(5)(h) aggravating factor. Such application is fatal to the rational and consistent standards required by the Eighth and Fourteenth Amendments. See Godfrey v. Georgia, supra, 446 U.S. at 427-428, 432-433.

An additional constitutional defect in this case is that the aggravating factor of "heinous, atorcious or cruel" was not defined in the instructions to the jury. The trial judge merely read to the jury that one of the aggravating factors was that "the capital felony was especially heinous, atrocious or cruel" without any further definition. In Godfrey v. Georgia, supra this Court disapproved of an instruction that told the jury of the Georgia equivalent of §(5)(h). The jury in Godfrey was simply told that one factor was "outrageously or wantonly vile, horrible and inhuman." As this

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18/ Nor is there any evidence or any finding that the deceased knew she would be killed -- a factor that the Supreme Court of Florida has used with some frequency to make an otherwise non-heinous gun shot death, heinous, atrocious or cruel. E.g. Combs v. State, 403 So.2d 418 (Fla. 1981); Jones v. State, 411 So.2d 165 (Fla. 1982); Steinhorst v. State, 412 So.2d 332 (Fla. 1982). See also Zeigler v. State, 402 So.2d 365 (Fla. 1981).

19/ For example, there was evidence that petitioner tried unsuccessfully to plant marijuana in her car to have her arrested, he threw firecrackers in her yard one time, she went to his girlfriend place of employment and created a confrontational scene, she confronted petitioner in his cabinet shop where they began to fight with petitioner being bitten and cut, petitioner allegedly called one time to have her phone disconnected, she harassed his girlfriend, he sent a threatening note to her, she frequently called him resulting in her roommate opining that she was provoking petitioner.

Court held in Godfrey:

> "There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence."

446 U.S. at 428. It was noted that the "jury's interpretation of [the aggravating factor] can only be subject of sheer speculation." Id. at 429.

The same constitutional defect obtains in the present case and Godfrey controls to require invalidation of the factor of "heinous, atrocious or cruel."

Although the question was raised in the appeal below, the Florida Supreme Court refused to review the issue. The court held that since it affirmed the death sentence in the prior appeal of this cause, before it vacated the death sentence for a violation of Gardner, it would not reach issues going to the sentencing trial (10a). Such reasoning is contrary to the need for there to be a valid jury verdict as a prerequisite to a valid death sentence in Florida,[20] and it is contrary to the need for this death sentence to be constitutionally valid on its own. The effect of the Florida Suprme Court's ruling is to uphold the failure to instruct the jury on 8(5)(h) in this case for its reasoning was that it was affirming the death sentence because it had previously affirmed it.[21]

The Florida Supreme Court's holding ignores the intervening decision and the retroactive effect of Godfrey v. Georgia, supra. The applicability of Godfrey was briefed and presented to the Supreme Court of Florida[22] and after the

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[20] Both the sentencing judge and the Florida Supreme Court relied upon the jury's sentencing verdict in support of petitioner's death sentence. As discussed in the prior issue, the courts applied a presumption of the correctness of the prior sentence, and no jury was permitted in this sentencing proceeding in reliance upon the prior sentencing trial.

[21] Such action by the Florida Supreme Court further highlights the error in the presumption of correctness in that prior sentence that is addressed in the previous issue herein above.

[22] The decision in Godfrey was relied upon extensively in petitioner's brief in the Florida Supreme Court in petitioner's challenge to both the finding of 8(5)(h) and the failure to define it in the jury charge.

affirmance that ignored Godfrey petitioner raised the issue of the retroactivity of Godfrey in his motion for rehearing in the Supreme Court of Florida[23/] -- yet the court upheld the application of the §(5)(h) aggravating factor. The failure of the Supreme Court of Florida recognize the retroactivity of Godfrey v. Georgia, supra, was fundamentally erroneous and contrary to the decisions of this Court. In Godfrey this Court was dealing with the application of the statute that was upheld on its face in 1976 in Gregg v. Georgia, supra. Likewise, in 1976, the Florida capital sentencing statute was upheld on its face in Proffitt v. Florida, 428 U.S. 242 (1976). In Godfrey this Court applied the Eighth and Fourteenth Amendment mandate of Furman v. Georgia, 408 U.S. 238 (1972). Godfrey found the "standardless and unchannelled imposition of death sentences in the uncontrolled discretion of a basically uninstructed jury...." 446 U.S. at 429. Accordingly, because Godfrey applied previously established constitutional principles and dealt with the underlying Eighth and Fourteenth Amendment requirements for a death sentence to be constitutionally imposed, it meets the standards for retroactive application.[24/] The Florida Supreme Court thus fatally erred in ignoring and failing to give retroactive effect to Godfrey v. Georgia, supra; because under Godfrey the death sentence imposed on petitioner is constitutionally infirm and must be vacated.

Accordingly this case presents the appropriate case to review and this Court should grant certiorari to review whether the application of the §(5)(h) aggravating factor in this case constitutes such a broad and vague construction so as to violate the Eighth and Fourteenth Amendments and to decide whether Godfrey v. Georgia, supra should be given retroactive application.

23/In his motion for rehearing petitioner expressly alleged, inter alia, that: "In declining to reach the question of the lack of any definition of 'heinous, atrocious, or cruel' in the charge to the jury, this Court may have overlooked the retroactivity of the intervening decision of Godfrey v. Georgia, 446 U.S. 420 (1980).

24/See, e.g., United States v. Johnson, ___U.S.___, 73 L.Ed.2d 202 (1982).

CONCLUSION

The Petition for the Writ of Certiorari to the Supreme Court of Florida should be granted.

Respectfully submitted,

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